

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

CIRBA INC. (d/b/a DENSIFY)
and CIRBA IP, INC.,

Plaintiffs,

v.

VMWARE, INC.,

Defendant.

C.A. No. 19-742-LPS

**PUBLIC REDACTED VERSION
(Filed April 27, 2020)**

**DEFENDANT VMWARE’S MOTION FOR LEAVE TO FILE A SUR-REPLY
IN OPPOSITION TO CIRBA’S MOTION FOR POST-TRIAL RELIEF**

VMware moves this Court for leave to file a short sur-reply in opposition to Cirba’s Motion for Post-Trial Relief (D.I. 604). Leave should be granted because (1) Cirba’s reply attaches and relies upon two new declarations from Cirba’s experts, Vijay Madiseti and Jim Bergman (D.I. 680; D.I. 682); and (2) VMware’s proposed 2-page sur-reply and supporting declaration correct misstatements in Cirba’s untimely new declarations (Ex. A).

I. CIRBA’S REPLY CONTAINS NEW DECLARATIONS FROM ITS EXPERTS

Cirba filed its Reply Brief in Support of its Motion for Post-Trial Relief on April 14, 2020. (D.I. 679.) Cirba’s Reply Brief attaches new declarations from (i) its technical expert Dr. Madiseti (D.I. 680) and (ii) its damages expert Mr. Bergman (D.I. 682).

In his declaration, Dr. Madiseti describes his analysis of the new vSphere 7 product released on April 2, 2020. (D.I. 680.) He further speculates about what he “believe[s]” to be true of vSphere 7, including that: (1) “VMware can simply change the user interface to enable or add the Compute Policies menu item” (D.I. 680 ¶ 6; *see also id.* ¶ 5); (2) “Compute Polices are fully implemented and available in vSphere [7]” (*id.* ¶ 15; *see also id.* ¶ 9); and (3) “VMware can

easily provide access to the Compute Policies feature to its customer base through multiple ways” (*id.* ¶ 18; *see also id.* ¶ 11). Relying on Dr. Madisetti’s new declaration, Cirba argues in its Reply Brief that the “compute policies lie dormant in vSphere 7, temporarily disabled,” but are “ready to be reenabled upon demand” and “coiled to strike.” (D.I. 679 at 1.) Cirba offered none of these statements or analysis in its opening brief (D.I. 605) or its Notice of Subsequent Development (D.I. 642), thereby depriving VMware of the opportunity to respond to them.

Mr. Bergman’s declaration, too, contains new opinions and evidence to which VMware has not had an opportunity to respond. These include: (1) accusing VMware’s expert, Paul Meyer, of ignoring the jury verdict and the law (D.I. 682 ¶¶ 9, 14-19); (2) referencing new evidence and offering new opinions for his theory that VMware would agree to give Cirba 100% of its profits (*id.* ¶¶ 10, 20-22); and (3) asserting, for the first time, that calculating a royalty tied to instances of infringement would be “impractical” (*id.* ¶¶ 11, 24-27).

II. VMWARE’S PROPOSED SUR-REPLY ADDRESSES INCORRECT STATEMENTS IN CIRBA’S NEW DECLARATIONS

D. Del. LR 7.1.2 provides that parties may submit additional papers after briefing is complete with the Court’s approval. “A non-moving party always has the right to respond to new arguments raised in a reply by requesting leave to file a sur-reply.” *Catherine B. ex rel. B.B. v. Del. Coll. Preparatory Acad.*, No. 16-806-CFC, 2019 WL 949204, at *5 (D. Del. Feb. 27, 2019) (citing *Novartis AG v. Actavis*, 243 F. Supp. 3d 534, 540 (D. Del. 2017)), *vacated and remanded on other grounds*, No. 19-1649, 2020 WL 639249 (3d Cir. Feb. 11, 2020); *see also St. Clair Intellectual Prop. Consultants v. Samsung Elecs.*, 291 F.R.D. 75, 80 (D. Del. 2013) (“A Court may grant leave to file a sur-reply if it responds to new evidence, facts, or arguments.”); D. Del. LR 7.1.3 (c)(2).

The Court should allow VMware to file the proposed sur-reply and Supplemental

Declaration of Chandra Prathuri (Ex. A) to rebut Cirba's new arguments and evidence submitted for the first time in its Reply Brief. This would allow the Court to more "fully and fairly evaluate" the merits of Cirba's Motion for Post-Trial Relief. *See St. Clair*, 291 F.R.D. at 80 (allowing sur-reply to assess pending motion).

III. LOCAL RULE 7.1.1 STATEMENT

In accordance with D. Del. LR 7.1.1, on April 16, 2020, counsel for VMware contacted counsel for Cirba in a reasonable effort to reach agreement regarding the matters set forth in this motion. A telephonic meet and confer was held on April 17, 2020, including Delaware counsel for both sides, but the parties were unable to reach agreement.

Dated: April 20, 2020

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CERTIFICATE OF SERVICE

I, Anne Shea Gaza, hereby certify that on April 27, 2020, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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I further certify that on April 27, 2020, I caused the foregoing document to be served via electronic mail upon the above-listed counsel and on the following:

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